HARVARD

LAW REVIEW.

VOL. VI. NOVEMBER 5, 1892. NO. 4.

A NEW VIEW OF THE DARTMOUTH COLLEGE CASE.[1]

[The following notes by Chief-Justice Doe were made some time since in the investigation of a case then pending before the Supreme Court of New Hampshire. He may use them in preparing the opinion to be hereafter reported in that case. — EDITORS.]

IN the frequent comments which have been made upon the Dartmouth College Case, it has been quite common to discuss the matter: first, as if the sole question was whether a charter is revocable; and second, as though the interests of corporators, if not protected by the Federal Constitution, were not protected at all. But if the counsel for the College were correct in their contention, the Acts of 1816 were much more objectionable than an Act simply repealing the charter. Those Acts, in their view, not only abolished the old corporation, but also gave its property to a new one.[2] The question involved, not merely the power to revoke the charter of a corporation, but the much more dangerous power to confiscate its property. The counsel for the College, having an eye to the immediate interests of their clients, and probably fearing that the Legislature might pass a simple repeal-

1 A brief history of the litigation is appended for reference. See page 181.

2 "In the Dartmouth College Case the Legislature of New Hampshire, by a special Act, undertook to abolish, in effect, a private corporation, and to give its property to others." Mr. Webster, in argument, Foster et al. *v.* Essex Bank, 16 Mass., at p. 269.

ing Act, appear to have argued the case upon the assumption that the two powers must stand or fall together. They deny the existence of either power; but they do not seem to deny that if the Legislature could revoke the charter, they could also dispose of the corporate property at their pleasure. It is now the settled doctrine, in the federal and other jurisdictions, that corporate dissolution does not take corporate property from its equitable owners. Under this modification of the ancient rule, the extinction of the College corporation by a repeal of its charter would not be as important as it was understood to be in 1819. The conclusion reached in the following notes is that a corporate charter is not a contract within the meaning of the Federal Constitution, and is revocable; that a repeal of the College charter would not divert the College property from the uses for which it is held in trust (the law not allowing the trust to fail for want of a trustee); that both courts were wrong; that the State Court erred in holding that the Acts of 1816 were not in violation of the State Constitution; and that the Federal Court erred in holding that the Federal Constitution prohibited a repeal of the charter.

The members of public corporations "have no private beneficial interest either in their franchises or their property. . . . A gift to a corporation created for public purposes is in reality a gift to the public." The trustees have no "private interest in the property of this institution, — nothing that can be sold or transferred; that can descend to their heirs, or can be assets in the hands of their administrators. If all the property of the institution were destroyed, the loss would be exclusively public, and no private loss to them. . . . Nor is it any private concern of theirs whether their powers, as corporators, shall be extended or lessened. . . . If such a corporation is not to be considered as a public corporation, it would be difficult to find one that should be so considered. . . . These trustees are the servants of the public, and the servant is not to resist the will of his master in a matter that concerns that master alone. . . . If the private rights of founders or donors have been infringed by these Acts, it is their business to vindicate their own rights; it is no concern of these plaintiffs. When founders and donors complain, it will be our duty to hear and decide; but we cannot adjudicate upon their rights till they come judicially before us. . . . The officers and students of the College . . . are not parties to this record, and cannot be legally heard in the discussion of this

cause. . . . The real question then is, Do these Acts unconstitutionally infringe any private rights of these trustees? . . . The legal identity of a corporation does not depend upon its being composed of the same natural persons, and . . . an addition of new members . . . cannot . . . make it a new and different corporation. . . . Nor, by the addition of new members, is any part of the legal title to the corporate property transferred from the old to the new members. The title remains unaltered in the corporation, . . . and the beneficial interest in the public."[1] So say the Supreme Court of New Hampshire, speaking through Chief-Justice Richardson, in their decision of the case.

The preservation of the rights comprised in the equitable title is the purpose for which the donors conveyed the legal title and perpetual powers to the trustees. While the conveyance vested nothing in the trustees for their private benefit, it imposed obligations which they cannot lawfully neglect. With the legal title, they accepted the powers and duties attached to it by the original owners. Their office is the position the donors would occupy if living, and holding the property under a valid and irrevocable declaration of the same trust. By accepting that position the trustees became, for many practical purposes and in a large legal sense, the representatives of the donors and the beneficiaries. One reason for making the trust perpetual was that the time would come when the donors could not administer their own charity, or go into court to defend the legal title, or complain in behalf of the numerous and unorganized body of equitable owners whose interests might need protection. If the trustees held the equitable title, they could waive rights which they are now bound to maintain by a diligent use of their power (not omitting any necessary resort to legal process), as a guardian is bound to care for the rights of his ward. Their lack of private, beneficial interest, and the separation of the equitable from the legal title, do not weaken their legal title, nor affect their power and duty of holding and maintaining their right to hold the property for the benefit of the equitable owners whose protectors they are.

An executor's lack of beneficial interest would not prevent his contesting the validity of a statute appointing two additional trustees to act with him, and conveying to them two-thirds of his title and power. Notwithstanding his lack of personal interest, he could act for those whom he represented, and could

[1] Trustees of Dartmouth College *v.* Woodward, 1 N. H. 111, 117, 119, 120, 121, 122, 123, 124, 125.

assert their right against the statute that would be, not a valid enactment, but invalid administration. A termination of his office by a repeal of law would not make the appointment of his successor a law-making Act. If a repeal of the College charter would create an official fiduciary vacancy, and leave no one in possession of the legal title of the College property, it would not destroy either the legal or the equitable title, and would not give a legislative character to the act of filling the vacancy, or the act of conveying the property. The right of conveyance, like the rest of the rights which constitute ownership, does not belong to the State, and cannot be exercised by the State as owner, nor by those legislative agents of the State who can convey the State's property, but cannot exercise all rights of ownership over all property of which the State is not the owner.

The rule placing "natural persons and corporations precisely upon the same ground" of general liability to legislative control, is "the only one upon which equal rights and just liabilities and duties can be fairly based."[1] A railroad corporation is "put in the same position a natural person would occupy if engaged in the same or like business. Its rights and its privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less."[2] This is an application of the equitable principle that the corporate fiction does not operate beyond the purpose of its introduction. It neither increases nor diminishes legislative control of natural persons, their legal titles or equitable interests. The theory that an amendment of the Dartmouth charter, enlarging a minority of the corporation into a majority by an appointment of nine additional members, does not convey any part of the property or fiduciary power, and does not affect the legal title of the trustees or the beneficial interest of the students, because twenty-one trustees are the same imaginary being as the twelve, is an application of the error that subjects corporate property to double taxation. The error is an illimitable expansion of the corporate fiction, subjecting natural persons to an impairment of their contracts and an invasion of their legal titles and beneficial interests.

All the legal advantages of individuality desired for a collective and changing body of twelve trustees could have been bestowed upon them by the Provincial Legislature, as well without as with

[1] Thorpe *v.* R & B. Railway, 27 Vt. 140, 145.
[2] Stone *v.* F. L. & T. Co., 116 U. S. 307, 329.

resort to the imagination for the creation of a non-natural person. Incorporation was not necessary for their succession, their exemption from personal liability for the payment of judgments, or their unity in litigation and the service of process. As natural persons, under special or general statute, they could have had succession, exemption, and every benefit of corporate personality. The employment of fiction for this purpose neither subjected them to, nor exempted them from, the exercise of legislative power. So far as the question of power is concerned, it is immaterial whether the object of incorporation was accomplished by incorporation or otherwise. The irrelevancy of the fiction was distinctly asserted by the two members of this court who decided the case (the docket shows that Judge Woodbury, who was one of the nine new trustees, did not sit), when they declared it to be their duty, in determining the rights in controversy, to "look beyond that intangible creature of the law, the corporation, which in form possesses them, to the individuals, and to the public, to whom in reality they belong, and who alone can be injured by a violation of them."[1] The only rights in controversy were the ownership and control of the College property.

Vague and exaggerated ideas were (and still are) entertained of the utility and necessity of incorporation under a general or special law, and of the damage resulting from a repeal of that law. Chief-Justice Marshall said:[2] "In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating Act. . . . An artificial, immortal being was created by the Crown." An intangible, invisible being, possessing no mental, moral, or physical capacity,[3] may be a convenient figure of speech; but the true view of legal principles is to be found in the region of realities, where the college corporation is no other person or creature than the consecutive body of twelve men, who were not created by the Crown, and who could hold and manage the College property without a charter, in the exercise of the common-law powers of trustees

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[1] 1 N. H. 120.

[2] Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518, 637, 642.

[3] Case of Sutton's Hospital, 10 Rep. 32 *b*; Tipling *v.* Pexall, 2 Bulstr. 233; Bissell *v.* M. Co., 22 N. Y. 258, 266.

appointed by deeds or wills. The charter was an amendment of the common law, — an act of special legislation, restricted in its operation to a single trust. The statute of limited partnerships[1] is a general act of legislation. It alters the common law in relation to special partners. Being mere legislation, it is repealable, as it would be if it were a special Act applicable to one firm only. In what respect, of any importance in the College case, does the Dartmouth charter differ from the statutory regulation of the rights and liabilities of a special partner?

The founders of Dartmouth College desired to put some of their private property in the hands of twelve agents, called trustees, who should be bound to perpetuate the succession and identity of their agency by exercising their elective power of filling vacancies, and bound to apply the trust-fund according to the donors' lawful directions. It is useful to consider what material part of the plan could not have been as well accomplished by wills or trust-deeds containing the essential provisions of the charter, without an incorporation of the agents; what alteration was made by the sounding phrases of the royal grant; for what purpose was a corporate fiction necessary; what was gained by its acceptance; and what harm would be done by a valid repeal of the charter, terminating the existence of the mythical being created by the Crown. What difference is there in the effect of the charter or the effect of its repeal, whether the power of perpetuating the fiduciary body by appointment is in that body, as in the case of the College and the case of an ordinary academy,[2] or in other ecclesiastical and political bodies, as in the case of Elliot Hospital,[3] or in a judicial tribunal, as in a multitude of other cases?[4] These are vital questions. They require an analysis of the charter, and an understanding of the distinction between its repealable law and its irrepealable contract. They lead the inquirer away from the fanciful and false theory of an implied governmental promise that the Legislature shall not exercise their power of repealing the charter law, to the express charter stipulations of donors intrusting the legal title, possession, and management of property to twelve trustees, and the agreement of the successive donees (lawfully appointed and accepting the trust fund and its accompanying agency), remain-

[1] General Laws of N. H., *c.* 118.

[2] Sanderson *v.* White, 18 Pick. 328, 329, 336.

[3] Chandler *v.* Batchelder, 61 N. H. 370, 371; Laws, 1881, *c.* 178.

[4] Story, Equity, §§ 1060, 1287; Adams, Equity, 36, 61; Schouler, petitioner, 134 Mass. 426; School-District *v.* Concord, 64 N. H. 235.

ing to be performed as long as a remnant of the property can be found.

A valid repeal of the charter would show how much of it is law, made in 1769 by the king, and how much of it is evidence of contracts made at different times by the donors and donees of the property. The charter conveyed no property from the king, and its rescission would annul no conveyance or gift of property and destroy no title. After a legislative revocation, judicial forfeiture, or voluntary surrender of the corporate powers and existence of The Orphans' Home,[1] The Franklin Street Society,[2] and The Amoskeag Manufacturing Company, their work, continued by unincorporated trustees or partners on the same premises, would be as lawful as if no corporate franchise had ever been granted. The educational substance of the College is no more destructible or pervertible than it would be if no corporate franchise had been accepted by the trustees.

If the charter had conveyed to the trustees an acre of the king's land, the property thus conveyed would have ceased to be the king's, and would not have passed from him to the State; and the State's conveyance of it, without payment of its value, and without legal process, like a conveyance of any other property not owned by the State, would not be an enactment of law. As holders of the legal title and representatives of the equitable proprietors, the trustees could sell the land, because a sale would be an exercise of the owner's right, and would not be legislation. For the same reason, with or without a repeal of the charter, the State could not give the land to others, or exercise the owners' right of sale. The trust fund passed to the trustees from the donors, both parties assenting to the charter as evidence of a contract executed on the part of the donors by their conveyance of title and powers, but executory on the part of the donees during the existence of the fund. The evidence and obligation of this contract would remain unimpaired after the repeal of all the law made by the grant of the charter, and after the extinction of the imaginary being fabricated by the trustees' acceptance of that grant.

If the College trust had been established in 1769 by the private contract of a deed without a charter, and the property had been left, by death or resignation, in 1869, without a manager, the trust would have been sustained by an appointment of trustees. The

[1] Laws of N. H., 1871, C. 98.

[2] 60 N. H. 342.

law would have made the appointment on grounds of a strictly judicial nature; for a strictly legal cause, stated in writing with legal certainty, made a public record, and maintainable on demurrer; for the sole purpose of accomplishing the donors' design, proved by competent evidence; and after all interested parties had an opportunity for a fair trial, to which they would not be entitled in law-making procedure. The law would have done this through the agency and by the decree of a tribunal liable (as the Legislature is not) to impeachment for partiality, corruption, or any intended wrong in the discharge of the duty of carrying into effect the legally proved intention of the donors. If every vacancy in the unincorporated board of trustees had been filled by the surviving members, for a hundred years, in execution of the contract of 1769, and the board had unanimously accepted a charter in 1869, their mere incorporation would not have changed the school or the fund. Their contract, made by the grantor's delivery and the grantees' acceptance of the deed and property, would have remained to be perpetually performed by the grantees. Their change from an unincorporated to an incorporated body would not have affected the continuous fiduciary powers conveyed with the property by its grantors to its grantees, or the grantees' continuous duty of holding and applying the property in performance of an obligation as contractual as that of a devisee who accepts land charged, by his testator's order, with the payment of a legacy.[1] A return from the corporate to the unincorporate form would leave the substance of the trust unchanged. After a repeal of the supposed charter of 1869, as well as before its enactment, the use of the names of twelve trustees in conveyances, writs, and judgments would not be, for them, a serious disadvantage; and some other law than an Act of Incorporation (which they could refuse to accept) could obviate any public or private inconvenience in the service of process upon them, and relieve them from any personal liability[2] from which they would be exempt under an unconditional charter. By our common law their perpetual succession could be provided for in the original deed, and subsequent gifts to " The Trustees of Dartmouth College " would be equally valid whether the donees were incorporated or not.

When a due examination of the subject has shown how much the effect of incorporation and the effect of repeal have been overrated,

[1] Pickering *v.* Pickering, 15 N. H. 281, 290, 297; 43 N. Y. 443.

[2] Wait *v.* Holt, 58 N. H. 467; Hardy *v.* Bank, 61 N. H. 34, 39.

and how much obscurity and mystification have arisen from the theory and practice of administering law to a soulless and bodiless figment incapable of rights or duties, a clear view can be had of the College corporation as a body of twelve natural persons, holding the College property in trust, and having a contractual right and a contractual duty, in court and out of court, to defend both the legal and the equitable title.

The Act of 1816, upon which the College case arose, expressed a purpose to reconstruct the corporation and convey property that did not belong to the State. It provided that the Governor and Council should appoint nine additional trustees, and that the nine new trustees and the other twelve should have and hold the legal title of the trust property then vested in the twelve. This provision purported to be a conveyance of a part of the legal title from the twelve to the nine. The authority for the appointment of the nine was not strengthened by legislative delegation. If there was a power of appointing the nine, the Legislature could have exercised it by naming the appointees in the Reconstruction Act, and could have appointed themselves or any number of other persons, without regard to the directions given by the donors of the trust fund. There is no constitutional provision dividing every trust fund into twenty-one equal parts, and authorizing a legislative conveyance of nine of the parts from the holder of the legal title to one or more persons selected by the Senate and House. Our decision, sustaining the legislative conveyance of 1816, was not based on any distinction between a power to convey a part of the property and a power to convey the whole. If, by New Hampshire law, the Act of 1816 was a valid conveyance of a part of the title from the twelve trustees to the nine appointed under the Act, then, by the same law, from 1784 to the adoption of the Federal Constitution, the members of the Legislature would have made a valid law by conveying to themselves the whole legal title of the College estate, real and personal, and all other property held in any incorporated or unincorporated trust, without trial, without notice, and without cause, and can make the unilateral conveyance whenever, by amendment or interpretation, the federal restriction is removed. This conception of the law-making character of a conveyance leaves no legal ground for denying the validity of the legislative conveyance of any property, or for asserting the validity of any conveyance not made by legislators. The administration of the law of trusts is either legislative or judicial;

it cannot be both. The assertion that it is legislative is a claim that the judicial administration of trusts has been illegal since 1784. And if the administration of fiduciary law is legislative, it remains to be shown how the administration of any law can be judicial.

In the College case, our decision that the conveyance of a part of the legal title and fiduciary right and duty from twelve trustees to nine others was an exercise of legislative power within the meaning of the second article of the State Constitution, was not and could not be overruled by the Federal Court. But it can be sustained only on the theory that the College property is the property of the State, or of a section of the public, and can be placed by the State in the hands of any number of State agents, whom the Legislature can elect, and whom the Legislature can remove from office at any time, without notice and without cause; and this position is untenable. No part of the title, legal or equitable, is held by the State or any of its territorial divisions. The legal title is in the trustees; and the equitable interest, free from the restriction of a State boundary, is in "youth of the Indian tribes," "English youth, and any others," duly qualified, and seeking the privileges furnished by the trustees' legal execution of the donors' educational purpose. Indirectly, the State, and other States, and the world may be benefited by gifts of property to the College; but the direct interest of persons entitled to be students of the College is an equitable title containing "private rights . . . which courts of justice are bound to notice, — rights which, if unjustly infringed, even by the trustees themselves, this court, upon a proper application, would feel itself bound to protect." [1] Although "the students are fluctuating," the proposition of the Federal Court that "no individual among our youth has a vested interest in the institution which can be asserted in a court of justice," that the "potential rights" of "the students who are to derive learning from this source" are "incapable of being asserted by the students," and that the students have no "rights to be violated," [2] taken in the comprehensive sense in which it would be generally understood, is misleading. Let the trustees unanimously vote, under express statutory permission, to divert the trust fund from the lawful uses intended by the donors, and, upon complaint duly made [3] by the students as plaintiffs in interest, it would be found that in-

[1] 1 N H. 122.

[2] 4 Wheat. 641, 643.

[3] Attorney-General *v.* Dublin, 38 N. H. 459; Hill *v.* Goodwin, 56 N. H. 441, 453; Boody *v.* Watson, 64 N. H. 162, 174; Attorney-General *v.* T. I. Co., 104 Mass. 239.

dividuals among our youth have an interest in the institution which the highest law of the State protects.

These rights of the students, like their rights of transportation on an incorporated railroad, are public in a certain sense. They are public in a larger sense than that mentioned in O. S. Society *v.* Crocker.[1] They are not derived from and do not depend upon the courtesy of the trustees. But they do not make the College property public in the sense in which the State House, State Library, and State prison are public. On its own land the State, by its legislative agents, can build a road for public use. On the College land, the Legislature cannot build a road, against the owner's objection, without paying the owner for a right of way. The State's ownership, which is the test of its power to use land as a highway without compensation, is the test of the legislative power of conveying the College property. The State not being the owner of that property, the Act of 1816, so far as it purported to convey a part of the College title, was void, and our decision, so far as it sustained the conveyance, was wrong. The Act, being an infringement of rights of property and contract reserved by the second, twelfth, fifteenth, twentieth, twenty-third, and thirty-seventh articles of the Bill of Rights, was not an exercise of legislative power.

When the distinction between the so-called imaginary existence of a corporate body and the actual existence of its lands, goods, and money is not clearly discerned, there often is an indistinct notion that a Legislature, empowered to destroy the owner's life without trial, can lawfully take the property and appropriate it to any use, before or after corporate dissolution, without compensation. But the death of the College corporation would not impair the students' equitable title to the College buildings and funds. This title has the same constitutional protection as any other private property not held in trust. As a way of necessity may be an incident of real estate, so the right of personal liberty includes self-defence and *habeas corpus*, as necessary means of exercising and enjoying it; and the right of property includes the right that an equitable interest shall not fail for want of trustees or other instrumentalities of administration. Adequate remedies, in general, are incidents of substantive constitutional rights. But an equitable title seems insecure when it is supposed to depend upon

[1] 119 Mass. 1, 24, 25.

a corporate holder of the legal title whose fictitious existence may be terminated at any time by voluntary surrender, judicial forfeiture, or legislative repeal. The Bill of Rights could have made a distinction between corporate and unincorporate property, or between property held by an incorporated or unincorporated trustee and other property held without a separation of its legal and equitable titles. A clause could have been inserted expressly excluding either from the general reservation of proprietary rights. In some jurisdictions, reported decisions have in effect introduced such a discrimination against the equitable owners of corporate property; and where this error is not distinctly rejected, the impression is by no means rare that for unknown reasons, and to an unknown extent, railroads and other estates held in trust by incorporated persons are peculiarly defenceless.

A belief that Dartmouth students could be deprived of the use and benefit of the College property after a repeal of the charter may have originated in the feudal doctrine of escheat, and the rule that a fee simple given to a corporation is vested in the members "in their politique or incorporate capacity created by the policy of man, and therefore" the gift is presumed to be upon the condition "that if such body politique or incorporate be dissolved, . . . the donor or grantor shall re-enter, for that the cause of the gift or grant faileth."[1] The statement that those founders of the College whose contributions were in money retain no interest in the property bestowed upon it, and "the donors of land are equally without interest, so long as the corporation shall exist,"[2] carries the implication that on a repeal of the charter the personal property would vest in the State, and the real would revert to the donors. On a repeal of the charter by Parliament before the Revolution, "the living donors," says Marshall, "would have witnessed the disappointment of their hopes."[3] In 1817, when the case was decided in this court, and in 1819, when it was decided in the Federal Court, it was understood that escheat and reverter would close the College on a statutory dissolution of the corporation; and a majority of the Federal Court held that such a disaster was barred by the king's implied promise that the legislative power of repealing the charter should not be exercised, and by the federal security of that contract. But it is now settled that the diversion of the corporate property from its

[1] Co. Lit. 13 *b*. [2] 4 Wheat. 641. [3] 4 Wheat. 643.

equitable owners by escheat and reverter after a charter repeal is an obsolete wrong.[1]

If all the property of Dartmouth College were held, in its present educational trust, by one incorporated person in his corporate capacity, with no special provision for a successor, and all the property of Exeter Academy were held in a like trust for that school by the same person in his unincorporated capacity, with a like want of provision for the future, the dissolution of his corporation by death would have no more effect upon the College than his resignation would have upon the Academy. There would be no more forfeiture of either fund than of his own estate.

After corporate dissolution the College property would be as safe, and the execution of the trust as sure, as if the trustees had rejected the charter and accepted all property given them for the College, or the corporation had been legally incompetent to execute the trust,[2] and an unincorporated trustee, appointed in their place, had died. A suspension of the legislative power of repeal is not necessary to prevent the common-law disappointment of the donors' hopes; and the true construction of the State Constitution does not expose the College funds to the danger which the federal decision was intended to meet.

The king's contract, suspending the legislative power of repealing the charter, was implied as a means of rescuing the College from a liability to be destroyed by a diversion of the trust property from its intended use after a dissolution of the corporation. The diversion was characterized as perfidious. Indignation was roused by an imagined misappropriation morally equivalent to embezzlement. Thus, Chief-Justice Marshall said: "Had Parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. . . . The contract would at that time have been deemed sacred by all. . . . This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. . . .

[1] Curran *v.* Arkansas, 15 How. 304, 310, 312; Broughton *v.* Pensacola, 93 U. S. 266, 268; Greenwood *v.* Freight Co., 105 U. S. 13, 19; School District *v.* Greenfield, 64 N. H. 84, 85; School District *v.* Concord, 64 N. H. 235; People *v.* O'Brien, 111 N. Y. 1; 2 Kent. Com. 307, note *b*.

[2] Chapin *v.* School District, 35 N. H. 445, 453, 454, 456.

It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation."[1]

The prevention of a common-law escheat and reverter of the property after a repeal of the charter, was a ground on which the moral right of repeal could be denied. So long as courts held that the trustees' loss of imaginary corporate life would be a common-law reason for inflicting upon the equitable owners a loss of the whole beneficial estate, a repeal of the charter would have been strongly opposed by a sense of justice. But the legal power of repeal can be denied only on legal grounds. A dissolution of the corporation by a voluntary surrender, judicial forfeiture, or legislative repeal of its charter would have raised the judicial question whether the supposed ruinous consequences of dissolution are imposed by the true rule of the common law. An affirmative answer would have raised the legislative question of changing such a rule; and in the decision of that question the Senate and House might be properly influenced by considerations of justice and expediency that do not show the legal construction of the charter and the Constitution. If the hopes and intentions of the donors would now be more exactly fulfilled, and the rights of the equitable owners more fully enjoyed, without incorporation than with it, this circumstance would not prove the legality of repeal. However great the wrongs which courts formerly thought the common law would commit when corporations were dissolved by surrender, forfeiture, or repeal, those wrongs were no evidence of an implied and void covenant made by the king in 1769, forever exempting the College charter from the legislative power of repeal vested at that time in Parliament, and afterwards in our Senate and House. There is no more implication of a contract on this subject in the incorporating law of the College than there would have been if the same law had been enacted by the Parliament of Great Britain or the Legislature of this State; and no more in a special Act of incorporation than in a general one. Under a general law, the deacons of the Congregational Church in Francestown are a corporation holding church property in trust.[2] If, on a dissolution of the corporation, the communion plate should be taken from its equitable owners and given to the State by an escheating rule of the common law, the

[1] 4 Wheat. 643, 644.

[2] G. L. of N. H., c. 153, § 6; Holt *v.* Downs, 58 N. H. 170, 171.

wrong that ought to be prevented by a repeal of that rule would be no evidence of an implied legislative contract that the wrong should be prevented by suspending the power of repealing the incorporating statute.

"A corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. . . . It would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence." "The dissolution of the corporation . . . cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company, . . . any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims . . . in any mode permitted by the local laws."[1]

"The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws."[2] In that case it was not doubted that the State could repeal the charter of a bank of which it was sole stockholder. The State contended that when it destroyed the corporation, the contracts made by the bank would no longer be in existence, and could not be enforced against the corporate property, which, upon the repeal of the charter, would revert, so far as it was realty, to the grantors, and would escheat, so far as it was personalty, to the State. But the court held that the property was charged with a trust which the dissolution of the corporation would not destroy, and that the law, which never allows a trust to fail for want of a trustee, would see to the execution of the trust in behalf of creditors. Repeal does not impair the obligation of contracts which the law enforces after repeal. The trust which holds the College property for the use and benefit of students is a contract made by the donors and the trustees. And as our common law would enforce their contract, and preserve the rights of the equitable owners, after dissolution as well as before, and the State Constitution does not authorize the Legislature to impair that contract or those rights, the hopes of the donors cannot be frustrated by legislation during the life of the corporation or afterwards,

[1] Mumma *v.* Potomac Co., 8 Pet. 281, 287, 286.

[2] Curran *v.* Arkansas, 15 How. 304, 319.

and no argument can be drawn from the common-law consequences of repeal. It being settled that escheat and reverter would not follow dissolution, the high moral ground on which the Federal Court held that the repealing power is suspended, does not exist. There never was any constitutional ground on which the doctrine of suspension could be maintained; and when judges corrected their views of the common law and vindicated its justice, nothing was left to support the constitutional error in a court of conscience.

If the ancient common-law consequences of dissolution were so grievous as to be considered proof of a bargain suspending the legislative power of repeal, why were they not proof of a bargain suspending the judicial power of forfeiture and the trustees' power of surrender? Was it judicial discretion that left the corporation exposed to two modes of destruction? The grantees of the charter were parties to whatever contract was made, and were endowed with contractual capacity. The court was not one of the parties. If the judicial power of forfeiture is saved only because the king's contract bound nobody but himself and those claiming a repealing power by, from, or under him, it must be admitted that the obligation of his contract would not be impaired by an exercise of some other repealing power than his. As it is not claimed that he could suspend any other repealing power than his own, and a repeal of the charter would have been an exercise of the ordinary legislative power of Parliament, his promise to abstain from doing what he could not do would have been as nugatory as his illegal and void contract to suspend the legislative power of Parliament.

"New Hampshire succeeds," it was said by Chief-Justice Marshall, to the "rights and obligations" of the Crown.[1] The Legislature cannot impair the obligation of a contract made by the king or any other person. Its impairment being retrospective, and being in other respects a violation of our Bill of Rights, is not legislative in the true legal sense in which the bill expounds the second article of the Constitution. But New Hampshire did not succeed to all the king's obligations. The State was not bound to pay his debts, and was not his successor in any sense that limits the law-making power of repeal. In the exercise of a power strictly legislative, Parliament (Commons, Lords, and king) could have enacted and repealed the incorporating law called the College Charter. Their repeal of it in 1770 would have dissolved the corporation.

[1] 4 Wheat. 643.

By an anomaly of the English government, the king could make, and could not repeal, the Act of Incorporation.

The English Bill of Rights is the substance of a Revolution that settled a disputed boundary of the royal prerogative. It effectually demolished "the doctrine of *non obstante*'s, which sets the prerogative above the laws," and "maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal."[1] Since the enactment of the bill in 1689, the sovereign has had no authority to exempt from legislative repeal a college charter granted either by the king or by Parliament. In the list which the bill gives of the violations of law for which James II. was deposed, the first is his usurpation of the dispensing power. After reciting that he had endeavored "to subvert and extirpate . . . the laws and liberties of this kingdom by assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of Parliament, . . . and by divers other arbitrary and illegal courses, . . . all which are utterly and directly contrary to the known laws and statutes and freedom of this realm," the bill declares "That the pretended power of suspending of laws or the execution of laws by regal authority, without consent of Parliament, is illegal; that the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." It enacts that all the rights and liberties which it asserts and declares "are the true, ancient, and indubitable rights and liberties of the people of this kingdom." The twelfth article provides that, without parliamentary authority, "no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect." With these articles are others that changed the dynasty. To the whole was given "the force of a law made in due form by authority of Parliament."

On the death of Anne without issue, in 1714, the Crown passed to the house of Hanover by the Act of Settlement of 1701. By the fourth section of that Act, after a preamble reciting that "the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws," "all the laws and statutes of this realm for securing . . . the rights and liberties of the people thereof, and all other laws and statutes of the same now in force," are ratified and confirmed.

[1] 1 Bl. Com. 342; 4 Ib. 440.

It was not by accident that these metes and bounds were incorporated in the foundations of the monarchy. "It had become indispensable to have a sovereign whose title to his throne was strictly bound up with the title of the nation to its liberties." In the Bill of Rights the dynastic change and the king's inability to suspend the law were joined, and in the Act of 1701 their union was confirmed, in order that the question which had been in dispute between the Stuarts and the people might not again be stirred. In 1760 this Revolution-settlement, continuing to withhold the Crown from the lineal heir, carried it to George III., in whose name the Dartmouth charter was granted in 1769.

"We," says James II. in 1687, "have thought fit, by virtue of our royal prerogative, to issue forth this our declaration of indulgence. . . . We do . . . declare that it is our royal will and pleasure that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical . . . be immediately suspended, and the further execution of the said penal laws, and every of them, is hereby suspended." [1] "This," says Powell, J.,[2] "is a dispensation with a witness. It amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no Parliament; all the legislature will be in the king."

The Stuart precedents of special dispensation concur with the general declaration of indulgence in leaving no suspension of law to be supplied by inference.[3] In Sclater's case the form is, "We do hereby of our further special grace, certain knowledge, and mere motion, give and grant unto the said Edward Sclater our royal licence and dispensation to" violate certain laws, "without incurring any pain, penalty, loss, . . . or disability by reason thereof; . . . and we do hereby grant, require, and command . . . that this our royal licence . . . and dispensation . . . shall be valid in law, and allowed by and in all our courts, . . . notwithstanding the Acts of Parliament hereinbefore mentioned, . . . and any other Act, statute, canon, constitution, provision, or restriction to the contrary thereof in any wise notwithstanding." [4]

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[1] King *v.* Sancroft, 12 St. Tr. 183, 232, 235.

[2] Ib. 427.

[3] Godden *v.* Hales, 11 St. Tr. 1166, 1178–1186; 1 Gutch's Collectanea Curiosa, 294.

[4] 1 Gutch's Coll., 290.

Had an exemption from repeal been granted in the Dartmouth charter according to the tenor of the familiar precedents of dispensation *non obstante*, and in the terms of an express contract, it would have taken some such form as this: "We do hereby, of our further special grace, certain knowledge, and mere motion, for us, our heirs, and successors, give and grant unto the said trustees of Dartmouth College, and to their successors forever, that these our letters patent shall never be repealed by an exercise of legislative power, in whatever person or persons said power may be vested; and it is our royal will and pleasure that the legislative power of repealing said letters patent be immediately suspended; and said power is hereby forever suspended; and we do hereby grant, require, and command that this our royal exemption and dispensation shall be valid in law, and allowed by and in all our courts; notwithstanding the Act of Parliament 1 W. & M. sess. 2, *c.* 2, known as the Bill of Rights; and notwithstanding § 4 of the Act of Parliament 12 & 13 W. III. *c.* 2, known as the Act of Settlement; and any other Act, statute, constitution, provision, restriction, or law to the contrary thereof in anywise notwithstanding; and this grant is a contract binding and disabling the possessors of legislative power forever.

This grant, if valid, would have suspended the fundamental law which authorizes Parliament to legislate. It would have been a dispensation and usurpation not less explicit than any of those for which James II. was dethroned. There could be no plainer violation of the Bill of Rights, in which the illegality of royal dispensations is set forth as a dominant principle of the Constitution and a justification of the Revolution. Except as a forfeiture of the Crown, the suspending contract, written in the charter by the king, would have had no effect. It would have been void in the most unqualified sense of invalidity known to English or American law. The charter would have been as repealable by the legislative power of Parliament as if that power, instead of being expressly suspended, had been expressly reserved. No property would have been given to the College on the faith of a contract, the illegality and nullity of which had ceased to be an open question eighty years before the date of the charter.

The charter contains no exemption from repeal, and no clause or word capable of being understood as an allusion to the subject. Neither in that document nor elsewhere is there any evidence of the grantor's intention to attempt a suspension of the legislative power of repeal, which was vested at the date of the charter in Par-

liament, and afterwards in our Senate and House. It was not supposed by him or his grantees that an implied dispensation would be more effective than an express *non obstante*, or that an Act of Incorporation, which could not be made irrepealable by king, Lords, and Commons, could be made irrepealable by the king alone. He and his grantees well knew that his contractual suspension of repealing power, in whatever words expressed, or from whatever evidence implied, would insure the immediate repeal of the charter, and imperil the contracting parties, and all others conspiring with them to reverse the Revolution. There is no rule of construction, and no presumption of law or fact, on which a court can find an implied contract of the king to suspend the English Constitution and reopen the question which the nation had settled by expelling the Stuarts and transferring the Crown to his family, with an express exclusion of suspending power.

In 1769 men could be found as servile as any of those who drew the Stuart dispensations, and as ready for safe employment. But no one would have engaged, as principal or accessary, in a regal suspension of legislative power with any hope of success or safety, or imagined that the offence would be implied from a mere Act of Incorporation. It was physically possible for the king to insert in the Dartmouth charter the terms of a contract assuming to exempt the grantees from the legislative power of repeal; but he had no motive to unsettle his own title by a useless violation of the Bill of Rights and the Act of 1701. He knew why he reigned instead of Charles Edward. He called himself "a Whig of the Revolution." There was nothing to induce any one to ask a charter that would be repealed as soon as it came to the knowledge of Parliament, and would be conclusive evidence that its acceptors had aided and abetted in a lawless attempt to change the government. When so fruitless and hazardous an enterprise is inferred without proof, the presumptions of sanity and legal purpose are set aside without gaining any ground of validity or legality. As a matter of law and a matter of fact, an exemption is not proved. It is as certain that it never existed in the intention and understanding of the parties[1] as that it was never signed or written or spoken by them or by any one of them. The subject is one on which public opinion, in England and America, has been so unanimous and vehement since 1688 that no successor of James II. would have dared to grant, and

[1] Delano *v.* Goodwin, 48 N. H. 203, 206.

no grantee named in the College charter would have dared to accept, a dispensation *non obstante;* and the grant that would have been unavailing if it had been put in writing, would not be effectual if it were implied. The law does not infer and enforce a contractual suspension and violation of itself.

Since 1688 the right to the Crown has been derived from an Act of Parliament. The grant of the College charter was an exercise of authority conveyed to the grantor, as a part of his office, by a statute that withheld the prerogative of suspending the repealing power. His want of suspending capacity is the beginning of the short chain of the grantees' corporate title. If the English Revolution had not occurred, if the Bill of Rights and the Act of 1701 had not been passed, and the king's dispensing power, instead of being renounced by organic laws, had been established by them; and the College charter, instead of being silent on the subject, had contained a promise of exemption from the legislative power of repeal, — there would have been some ground for the claim that a repeal would impair the obligation of a contract. Upon the true view of the State Constitution, the charter, and the effect of corporate dissolution, the constructive suspension of repealing power is an effort to avert a danger that does not exist, by setting up a void contract that was not made.

CHARLES DOE.

It has been thought desirable to add a brief statement of the Dartmouth College Case.

It was an action of trover by the trustees of Dartmouth College against William H. Woodward, for the College records, the original charter, the common seal, and divers books of account. Woodward was the secretary and treasurer of the trustees of Dartmouth *University.* His right to the property depended on the validity of certain Acts of the Legislature of New Hampshire purporting to amend the charter of Dartmouth College and to change its name to Dartmouth University.

In the Supreme Court of New Hampshire the facts were agreed upon by the parties, and put in the form of a special verdict.

The material facts were as follows: —

Prior to the chartering of Dartmouth College, Rev. Dr. Eleazer Wheelock had founded at his own expense, on his estate in Connecticut, a charity school for Indians, and had maintained it by contributions given at his solicitation. Contributions had been made and were then being solicited in England for this purpose, and funds thus given were in the hands of trustees in England, appointed by Dr. Wheelock to

act in his behalf. Dr. Wheelock had made his own will, devising the existing charitable funds in trust to continue the school, and appointing trustees in America for that purpose. The proprietors of lands in the western part of New Hampshire promised to give large tracts, provided the school should be located in their section, and its benefits extended so as to include English youth as well as Indians. Dr. Wheelock, before removing the school, applied to the Crown for a charter; and the king, in 1769, granted the charter of Dartmouth College.

The charter recites, in substance, the facts above stated; ordains that there be a college erected in New Hampshire by the name of Dartmouth College, for the education of Indian and English youth; and that there shall be in said College "from henceforth and forever" a body corporate and politic, consisting of trustees of said College ("the whole number of said trustees consisting, and hereafter forever to consist, of twelve and no more"). The charter expresses the intent that the corporation shall have "perpetual succession and continuance forever." The charter appoints Dr. Wheelock and eleven other persons as trustees. From the recitals in the preamble it is to be presumed that not less than six of the eleven were the same persons who had already been named as trustees by Dr. Wheelock in his will. Seven trustees constitute a quorum. The board of trustees fill vacancies in their own number. The usual corporate privileges and powers are conferred upon the trustees and "their successors forever." The charter styles Dr. Wheelock "the Founder of said College," and appoints him president.

It did not appear, and was not claimed, that the Crown or the Province made any donations, or proffered any endowment, prior to, or simultaneously with, the grant of the charter. The funds turned over to the College upon incorporation consisted entirely of the private gifts contributed by Dr. Wheelock and by other persons at his request. Lands were given to the College by Vermont in 1785 (sixteen years after the incorporation), and by New Hampshire in 1789 and 1807.

June 27, 1816, the Legislature of New Hampshire passed "An Act to amend the charter and improve the corporation of Dartmouth College." The preamble styles Dartmouth "the college of this State." By this Act and two later Acts of the same year, the following changes were made in regard to the College: —

1. The name is changed to "The Trustees of Dartmouth University."

2. The number of trustees is increased from twelve to twenty-one, of whom nine shall constitute a quorum. The nine new trustees are to be appointed by the Governor and Council.

3. The trustees shall have power to organize colleges in the university; also to establish an institute, and elect fellows and members thereof.

4. A board of overseers, twenty-five in number, is created; the members to be appointed by the Governor and Council. The overseers are

to have power to disapprove and negative votes of the trustees relative to the appointment and removal of president, professors, and other officers; relative to salaries; and also relative to the establishment of colleges and professorships, and the erection of new college buildings.

5. Each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

The trustees of Dartmouth College refused to accept, or act under, the Acts of 1816.[1]

In the Supreme Court of New Hampshire the counsel for Dartmouth College argued that the Acts of 1816 were in conflict both with the Constitution of the State and the Constitution of the United States. As to the State Constitution, it was claimed that the Acts conflicted with several provisions, but especially with the provision that no subject shall be "deprived of his property, immunities, or privileges, . . . but by judgment of his peers or the law of the land." As to the United States Constitution, the Acts were claimed to be a violation of the provision that no State shall pass any law "impairing the obligation of contracts."

The Supreme Court of New Hampshire[2] gave judgment for the defendant, holding that the Acts were not in conflict with either the State or the United States Constitution. This decision, so far as it related to the State Constitution, was final; but the question relative to the Federal Constitution was carried to the United States Supreme Court by the plaintiffs on a writ of error.

The Supreme Court of the United States[3] held that the Acts of 1816 were in conflict with the above-mentioned clause of the United States Constitution, and consequently reversed the judgment of the State Court.

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[1] Eight or nine of the old board declined to accept or act under the new statutes. It was, in 1815–1816, matter of common knowledge that there was a schism in the board of trustees. In 1815 the board, by a vote of eight to four, removed Rev. Dr. John Wheelock, the son of the founder, from the presidency. The general belief was that the nine new trustees, appointed by the Governor under the Act of 1816, would side with the friends of Dr. Wheelock, thus converting the minority of the old board of twelve into a majority of the new board of twenty-one.

[2] 1 N. H. 111; also reported, with the arguments, 65 N. H. 473.

[3] 4 Wheaton, 518.